



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

September 30, 2014 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2013-239

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the September 30, 2014 public meeting, the Government Records Council ("Council") considered the September 23, 2014 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that the Executive Director respectfully recommends the Council find that the Custodian failed to establish that the complaint should be reconsidered based on new evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council's June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request or at the time of the Custodian's subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J.*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council's June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.



Interim Order Rendered by the
Government Records Council
On The 30th Day of September, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: October 1, 2014

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***Reconsideration*
Supplemental Findings and Recommendations of the Executive Director
September 30, 2014 Council Meeting**

**Jeffrey W. Sauter¹
Complainant**

GRC Complaint No. 2013-239

v.

**Township of Colts Neck (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Colts Neck Fire Company No. 2's ("Fire Company's") monthly business meeting sign-in sheets for the year 2012.

Custodian of Record: Robert Bowden

Request Received by Custodian: July 18, 2013; July 29, 2013

Response Made by Custodian: July 25, 2013; August 6, 2013; August 16, 2013

GRC Complaint Received: August 26, 2013

Background

June 24, 2014 Council Meeting:

At its June 24, 2014 public meeting, the Council considered the June 17, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Procedural History:

On June 25, 2014, the Council distributed its Interim Order to all parties. On July 8, 2014, the Custodian requested an extension of time until July 18, 2014 to submit a request for reconsideration. On July 8, 2014, the GRC granted this request. On July 16, 2014, the Custodian

¹ No legal representation listed on record.

² Represented by Christopher Ackerman, Esq. (Red Bank, N.J.).

sought additional time until July 25, 2014 to submit a request for reconsideration, stating that he had only just received relevant documents related to a matter filed by the Complainant in Superior Court. On July 16, 2014, the GRC granted this request.

On July 24, 2014, the Custodian filed a request for reconsideration of the Council's June 24, 2014 Interim Order based on new evidence. On August 4, 2014, the Complainant submitted a response to the Custodian's request for reconsideration.

Analysis

Reconsideration

Pursuant to N.J.A.C. 5:105-2.10, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10) business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. N.J.A.C. 5:105-2.10(a) – (e).

In the matter before the Council, the Custodian filed the request for an extension of time to seek reconsideration of the Council's Order dated June 24, 2014 on July 8, 2014, eight (8) days from the issuance of the Council's Order. The Custodian sought a second extension on July 16, 2014 until July 25, 2014. The GRC granted these requests, and the Custodian filed his request for reconsideration on July 24, 2014.

Applicable case law holds that:

"A party should not seek reconsideration merely based upon dissatisfaction with a decision." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, . . . 242 N.J. Super. at 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

As the moving party, the Custodian was required to establish either of the necessary criteria set forth above: either 1) the Council's decision is based upon a "palpably incorrect or

irrational basis;" or 2) it is obvious that the Council did not consider the significance of probative, competent evidence. *See Cummings*, 295 N.J. Super. at 384.

Here, Counsel for the Custodian ("Counsel") reiterates that the Custodian certified in his SOI that all of the documents in the Township's possession were provided to the Complainant. Counsel points out that the Township is not claiming that the sign-in sheets sought by the Complainant do not or did not exist; rather, Counsel states that these documents are missing and the Township does not know where they are. Additionally, Counsel argues that the fact that the Complainant obtained five (5) of the requested sign-in sheets from an unidentified member of the Fire Company does not prove that the Township or Fire Company have withheld records. Instead, Counsel contends that the Complainant should identify the source of these sign-in sheets to the GRC so that the Township can determine if the documents were stolen, if the Complainant has all of the requested documents in his possession, or if the Complainant has access to all of the requested documents. *Citing Bart v. City of Paterson Hous. Auth.*, 403 N.J. Super. 609 (App. Div. 2008).

Further, Counsel argues that the additional certification provided by the Complainant only establish that it was the practice of the Fire Company to utilize the requested sign-in sheets. Counsel advances that these documents are not in the possession of the Township or the Fire Company due to their unwanted removal, and that the Complainant should be forthcoming with any knowledge he has relating to the documents' disappearance.

The Complainant, in turn, certified in his response that he possesses copies of only five (5) of the sign-in sheets, that he has no knowledge of the whereabouts of the original documents, and that he played no part in the removal of the records.

The Custodian failed to establish that the complaint should be reconsidered based on new evidence. The Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria*, 242 N.J. Super. at 401. The Council's June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request or at the time of the Custodian's subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian's request for reconsideration should be denied. *Cummings*, 295 N.J. Super. at 384; *D'Atria*, 242 N.J. Super. at 401; *Comcast*, 2003 N.J. PUC at 5-6. As such, the Council's June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that the Custodian failed to establish that the complaint should be reconsidered based on new evidence. The

Custodian has also failed to show that the Council acted arbitrarily, capriciously or unreasonably. *See D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). The Council's June 24, 2014 Interim Order found that this complaint presented issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request or at the time of the Custodian's subsequent certifications. These questions still exist and, as Counsel points out, are joined by uncertainties as to when, how, and to what extent the Complainant gained access to the sought sign-in sheets. Thus, the Custodian's request for reconsideration should be denied. *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of S. Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Tel. Sys. In The City Of Atl. City, Cnty. Of Atl., State Of N.J., 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). As such, the Council's June 24, 2014 Interim Order still stands: this complaint should be referred to OAL for a determination of whether the Custodian lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

September 23, 2014



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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INTERIM ORDER

June 24, 2014 Government Records Council Meeting

Jeffrey W. Sauter
Complainant

Complaint No. 2013-239

v.

Township of Colts Neck (Monmouth)
Custodian of Record

At the June 24, 2014 public meeting, the Government Records Council ("Council") considered the June 17, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that as there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Interim Order Rendered by the
Government Records Council
On The 24th Day of June, 2014

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 25, 2014



**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 24, 2014 Council Meeting**

**Jeffrey W. Sauter¹
Complainant**

GRC Complaint No. 2013-239

v.

**Township of Colts Neck (Monmouth)²
Custodial Agency**

Records Relevant to Complaint: Colts Neck Fire Company No. 2's ("Fire Company's") monthly business meeting sign-in sheets for the year 2012.

Custodian of Record: Robert Bowden

Request Received by Custodian: July 18, 2013; July 29, 2013

Response Made by Custodian: July 25, 2013; August 6, 2013; August 16, 2013

GRC Complaint Received: August 26, 2013

Background³

Request and Response:

On July 16, 2013, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Custodian received this request on July 18, 2013. On July 25, 2013, five (5) business days later, the Custodian responded in writing stating that the requested records were ready for pick-up. On July 26, 2013, the Complainant wrote to the Custodian re-submitting his original OPRA request and stating that not all of the requested documents had been provided. The Custodian received this request on July 29, 2013. On August 6, 2013, six (6) business days later, the Custodian responded stating that the Township of Colts Neck ("Township") did not have the requested documents but seeking an extension of time until August 16, 2013 so that the Fire Company could provide the requested documents. On August 7, 2013, the Complainant replied asking that the documents be provided as soon as possible. On August 16, 2013, the Custodian advised the Complainant that he had requested the documents from the Fire Company, and provided a letter from the Fire Company stating that "all documents that are in our possession have been surrendered"

¹ No legal representation listed on record.

² Represented by Christopher Ackerman, Esq. (Red Bank, N.J.).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

Denial of Access Complaint:

On August 26, 2013, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserts that he requested the “sign-in sheets” of the Fire Company’s monthly business meetings but, in fact, received the “call sheets” that are not the official records of meeting attendance. The Complainant also asserts that he has documents for eleven (11) of twelve (12) of the Fire Company’s business meetings, and that three (3) of the twelve (12) “call sheets” he received may not be authentic. The Complainant argues that the Custodian’s statements that he had asked that the Fire Company provide the requested documents suggest that the documents do exist. The Complainant also contends that the Custodian did not respond to his requests within the seven (7) business day statutory period.

Statement of Information:

On January 7, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certifies that he received the Complainant’s OPRA request on July 18, 2013 and provided all records that he received from the Fire Company on July 25, 2013. The Custodian further certifies that, following his receipt of the Complainant’s July 26, 2013 letter stating that “business meeting sign-in sheets for 2012” were not turned over, he requested an extension of time and, on August 16, 2013, wrote again stating that an extensive search conducted by the Fire Company had indicated that the documents previously provided to the Township constituted the entire record within the Fire Company’s possession. The Custodian certifies that the requested business meeting sign-in sheets are not in the possession of the Township or Fire Company. The Custodian also provided a certification from Fire Company President Chris Quincannon that certifies same.

The Custodian states that he requested the records from the Fire Company because it is a separate entity from the Township and, as such, the Township does not maintain control of its records. The Custodian argues that all responses were timely provided to the Complainant. The Custodian also contends that the Complainant’s request is overly broad and that custodians are not required to conduct research or create new records in response to an OPRA request. *Citing N.J. Builders Ass’n v. N.J. Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007); *Bent v. Twp. of Stafford Police Dep’t*, 381 N.J. Super. 30, 37 (App. Div. 2005).

Additional Submissions:

On January 23, 2014, the Complainant provided a response to the Custodian’s SOI. The Complainant contends that the requested records are created by the Fire Company in the normal course of business. The Complainant certifies that he has been a member of the Fire Company for twenty (20) years, and that “the member sign-in sheet circulated at every monthly business meeting has been standard practice for many years, and continues to my knowledge as the official record of attendance today.” The Complainant attached a certification from one Kevin Sauter, which states:

1. I am member of the [Fire Company].

2. I have been a member [the Fire Company] for more than 30 years.

....

4. I am aware that starting on or about August 16, 2006, as President of [the Fire Company], I started the standing practice of having all members sign-in as the “official” record of attendance at monthly business meetings

5. I am aware this requirement was utilized as our companies’ official attendance record for all company business meetings was standard practice from August 2006 to on or about September 18, 2013

....

Certification of Kevin Sauter, January 13, 2014.

The Complainant also provided a certification from one Peter Wagar stating that has been a member of the Fire Company for twenty-five (25) years, and that “the member sign-in sheet, circulated at every meeting, has been standard practice for many years and continues to be utilized as the ‘official’ record of attendance.” Certification of Peter Wagar, January 11, 2014.

On March 17, 2014, the Complainant provided an additional letter to the GRC. The Complainant states that on March 7, 2014 he learned that certain Length of Service Award Program “LOSAP” payments had been made by the Township. The Complainant contends that the requested documents must exist, contrary to the Custodian’s assertions, because such documents are necessary for the Township to authorize the “LOSAP” payments.

On May 1, 2014, the Complainant provided a final letter to the GRC. With it, the Complainant provided to the GRC five (5) of the requested 2012 business meeting sign-in sheets. The Complainant states that these documents were provided to him in a confidential manner by another member of the Fire Company. The Complainant asserts that the discovery of these documents show that the requested records were knowingly and willfully not disclosed.

Analysis

Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5(g).⁴ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

⁴ A custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

Here, the Custodian responded in writing five (5) days after receiving the Complainant's initial request stating that the requested documents could be picked up. The Custodian then replied six (6) business days after receiving the Complainant's second request for the 2012 business meeting sign-in sheets by seeking an extension of time to respond until August 16, 2013. On August 16, 2013, the Custodian again responded to the Complainant, this time by stating that the Township and the Fire Company had provided all responsive records.

Therefore, the Custodian bore his burden of proof that he timely responded to the Complainant's OPRA request. N.J.S.A. 47:1A-6. The Custodian responded in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days of receiving the request. *See* N.J.S.A. 47:1A-5(g); N.J.S.A. 47:1A-5(i); Kelley, GRC 2007-11.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Here, the Custodian certified that, following an extensive search, all responsive records in possession of both the Township and the Fire Company were provided to the Complainant on July 25, 2013.⁵ The Custodian provided an additional certification of same from the President of the Fire Company. The Complainant, in turn, provided three (3) certifications from current, long-serving members of the Fire Company stating that member sign-in sheets were used as the official record of attendance during the time period specified in the Complainant's request. The Complainant also provided the GRC with copies of five (5) of the requested business meeting sign-in sheets.

The Administrative Procedures Act provides that the Office of Administrative Law ("OAL") "shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL]" N.J.A.C. 1:1-3.2(a). Accordingly, as there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

⁵ The GRC has twice previously determined that the Township Clerk here is responsible for the records held by the Fire Company. *See* Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2004-68 (May 2005); Sauter v. Twp. of Colts Neck (Monmouth), GRC Complaint No. 2005-07 (March 2006).

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that as there are issues of contested facts, specifically whether either the Township or the Fire Company possessed the requested records at the time of the Complainant's request, or at the time of the Custodian's subsequent certifications, this complaint should be referred to OAL for a determination of whether the lawfully denied access to the requested 2012 Fire Company business meeting sign-in sheets. Additionally, if necessary, OAL should make a determination of whether the Custodian knowingly and willfully violated OPRA and unlawfully denied access to the requested records under the totality of the circumstances.

Prepared By: Robert T. Sharkey, Esq.
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.
Acting Executive Director

June 17, 2014